

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Feb 22, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BRIAN W.,¹

Plaintiff,

vs.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:20-cv-00105-MKD

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 25, 27

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 25, 27. The parties consented to proceed before a magistrate judge. ECF No. 8. The Court, having reviewed the administrative record and the parties' briefing,

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

1 is fully informed. For the reasons discussed below, the Court denies Plaintiff's
2 motion, ECF No. 25, and grants Defendant's motion, ECF No. 27.

3 JURISDICTION

4 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g);
5 1383(c)(3).

6 STANDARD OF REVIEW

7 A district court's review of a final decision of the Commissioner of Social
8 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
9 limited; the Commissioner's decision will be disturbed "only if it is not supported
10 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
11 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
12 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
13 (quotation and citation omitted). Stated differently, substantial evidence equates to
14 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
15 citation omitted). In determining whether the standard has been satisfied, a
16 reviewing court must consider the entire record as a whole rather than searching
17 for supporting evidence in isolation. *Id.*

18 In reviewing a denial of benefits, a district court may not substitute its
19 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
20 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one

1 rational interpretation, [the court] must uphold the ALJ's findings if they are
2 supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674
3 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an
4 ALJ's decision on account of an error that is harmless." *Id.* An error is harmless
5 "where it is inconsequential to the [ALJ's] ultimate nondisability determination."
6 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ's
7 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
8 *Sanders*, 556 U.S. 396, 409-10 (2009).

9 **FIVE-STEP EVALUATION PROCESS**

10 A claimant must satisfy two conditions to be considered "disabled" within
11 the meaning of the Social Security Act. First, the claimant must be "unable to
12 engage in any substantial gainful activity by reason of any medically determinable
13 physical or mental impairment which can be expected to result in death or which
14 has lasted or can be expected to last for a continuous period of not less than twelve
15 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant's
16 impairment must be "of such severity that he is not only unable to do his previous
17 work[,] but cannot, considering his age, education, and work experience, engage in
18 any other kind of substantial gainful work which exists in the national economy."
19 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

1 The Commissioner has established a five-step sequential analysis to
2 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
3 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
4 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
5 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the
6 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
7 404.1520(b), 416.920(b).

8 If the claimant is not engaged in substantial gainful activity, the analysis
9 proceeds to step two. At this step, the Commissioner considers the severity of the
10 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
11 claimant suffers from "any impairment or combination of impairments which
12 significantly limits [his or her] physical or mental ability to do basic work
13 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
14 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
15 however, the Commissioner must find that the claimant is not disabled. *Id.*

16 At step three, the Commissioner compares the claimant's impairment to
17 severe impairments recognized by the Commissioner to be so severe as to preclude
18 a person from engaging in substantial gainful activity. 20 C.F.R. §§
19 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
20

1 severe than one of the enumerated impairments, the Commissioner must find the
2 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

3 If the severity of the claimant's impairment does not meet or exceed the
4 severity of the enumerated impairments, the Commissioner must pause to assess
5 the claimant's "residual functional capacity." Residual functional capacity (RFC),
6 defined generally as the claimant's ability to perform physical and mental work
7 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
8 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
9 analysis.

10 At step four, the Commissioner considers whether, in view of the claimant's
11 RFC, the claimant is capable of performing work that he or she has performed in
12 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
13 If the claimant is capable of performing past relevant work, the Commissioner
14 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).
15 If the claimant is incapable of performing such work, the analysis proceeds to step
16 five.

17 At step five, the Commissioner considers whether, in view of the claimant's
18 RFC, the claimant is capable of performing other work in the national economy.
19 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
20 the Commissioner must also consider vocational factors such as the claimant's age,

1 education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
2 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
3 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
4 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
5 work, analysis concludes with a finding that the claimant is disabled and is
6 therefore entitled to benefits. *Id.*

7 The claimant bears the burden of proof at steps one through four above.
8 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
9 step five, the burden shifts to the Commissioner to establish that 1) the claimant is
10 capable of performing other work; and 2) such work “exists in significant numbers
11 in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v.*
12 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

13 ALJ’S FINDINGS

14 On May 31, 2016, Plaintiff applied both for Title II disability insurance
15 benefits and Title XVI supplemental security income benefits alleging a disability
16 onset date of February 9, 2016. Tr. 15, 103, 286-306. The applications were
17 denied initially and on reconsideration. Tr. 159-66, 168-81. Plaintiff appeared
18 before an administrative law judge (ALJ) on August 22, 2018, and a supplemental
19 hearing was held on January 3, 2019 to take vocational expert testimony. Tr. 40-
20 86. On February 12, 2019, the ALJ denied Plaintiff’s claim. Tr. 12-39.

1 At step one of the sequential evaluation process, the ALJ found Plaintiff,
2 who met the insured status requirements through June 30, 2021, has not engaged in
3 substantial gainful activity since February 9, 2016. Tr. 18. At step two, the ALJ
4 found that Plaintiff has the following severe impairments: chronic low back pain,
5 status post microdiscectomy; degenerative disc disease of the cervical spine; labral
6 tear, right shoulder, status post arthroscopic shoulder surgery; obesity; history of
7 polysubstance abuse (methamphetamine, alcohol, cannabis); major depressive
8 disorder; and generalized anxiety disorder. *Id.*

9 At step three, the ALJ found Plaintiff does not have an impairment or
10 combination of impairments that meets or medically equals the severity of a listed
11 impairment. Tr. 19. The ALJ then concluded that Plaintiff has the RFC to perform
12 light work with the following limitations:

13 [Plaintiff] needs the ability to alternate sitting and standing
14 approximately every 60 minutes; bilateral pushing/pulling is
15 occasional, posturals are occasional, except he can never climb
16 ladders, ropes or scaffolds or crawl; overhead reaching is occasional;
17 and he would need to avoid concentrated exposure to industrial
18 vibration and hazards. From a psychological perspective, [Plaintiff] is
19 able to understand, remember and carry out simple, routine repetitive
20 tasks and instructions; he is able to maintain attention and
concentration for 2-hour intervals between regularly scheduled
breaks; he must be in a predictable environment with seldom change;
he can make simple judgment and decision making; he shall have no
fast paced production rate of pace, and there should be no interaction
with the public and the job should not be in a public work setting (i.e.
work setting out in public environment).

Tr. 20-21.

1 At step four, the ALJ found Plaintiff is unable to perform any of his past
2 relevant work. Tr. 29-30. At step five, the ALJ found that, considering Plaintiff's
3 age, education, work experience, RFC, and testimony from the vocational expert,
4 there were jobs that existed in significant numbers in the national economy that
5 Plaintiff could perform, such as inspector and handler, mail clerk, and electrical
6 accessory assembler. Tr. 31. Therefore, the ALJ concluded Plaintiff was not
7 under a disability, as defined in the Social Security Act, from the alleged onset date
8 of February 9, 2016, through the date of the decision. *Id.*

9 On February 11, 2020, the Appeals Council denied review of the ALJ's
10 decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for
11 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

12 ISSUES

13 Plaintiff seeks judicial review of the Commissioner's final decision denying
14 him disability insurance benefits under Title II and supplemental security income
15 benefits under Title XVI of the Social Security Act. Plaintiff raises the following
16 issues for review:

- 17 1. Whether the ALJ properly evaluated the medical opinion evidence;
- 18 2. Whether the ALJ properly evaluated Plaintiff's symptom claims;
- 19 3. Whether the ALJ properly evaluated the lay opinion evidence; and
- 20 4. Whether the ALJ conducted a proper step-five analysis.

1 ECF No. 25 at 7.

2 DISCUSSION

3 A. Medical Opinion Evidence

4 Plaintiff contends the ALJ erred in her consideration of the opinion of Jason
5 Wright, ARNP. ECF No. 25 at 10-13.

6 There are three types of physicians: “(1) those who treat the claimant
7 (treating physicians); (2) those who examine but do not treat the claimant
8 (examining physicians); and (3) those who neither examine nor treat the claimant
9 [but who review the claimant’s file] (nonexamining [or reviewing] physicians).”
10 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).
11 Generally, a treating physician’s opinion carries more weight than an examining
12 physician’s, and an examining physician’s opinion carries more weight than a
13 reviewing physician’s. *Id.* at 1202. “In addition, the regulations give more weight
14 to opinions that are explained than to those that are not, and to the opinions of
15 specialists concerning matters relating to their specialty over that of
16 nonspecialists.” *Id.* (citations omitted).

17 If a treating or examining physician’s opinion is uncontradicted, the ALJ
18 may reject it only by offering “clear and convincing reasons that are supported by
19 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
20 “However, the ALJ need not accept the opinion of any physician, including a

1 treating physician, if that opinion is brief, conclusory and inadequately supported
2 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
3 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
4 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
5 may only reject it by providing specific and legitimate reasons that are supported
6 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81
7 F.3d 821, 830-31 (9th Cir. 1995)). The opinion of a nonexamining physician may
8 serve as substantial evidence if it is supported by other independent evidence in the
9 record. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

10 “Only physicians and certain other qualified specialists are considered
11 ‘[a]cceptable medical sources.’” *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir.
12 2014) (alteration in original); *see* 20 C.F.R. §§ 404.1513, 416.913 (2013).²
13 However, an ALJ is required to consider evidence from non-acceptable medical
14 sources, such as therapists. 20 C.F.R. §§ 404.1513(d), 416.913(d) (2013).³ An

16 ² The regulation that defines acceptable medical sources is found at 20 C.F.R. §§
17 404.1502, 416.902 for claims filed after March 27, 2017. The Court applies the
18 regulation in effect at the time the claim was filed.

19 ³ The regulation that requires an ALJ’s consider opinions from non-acceptable
20 medical sources is found at 20 C.F.R. §§ 404.1502c, 416.920c for claims filed after

1 ALJ may reject the opinion of a non-acceptable medical source by giving reasons
2 germane to the opinion.⁴ *Ghanim*, 763 F.3d at 1161.

3 On October 24, 2017, Mr. Wright, a treating advanced registered nurse
4 practitioner, opined Plaintiff: can lift/carry less than 10 pounds; can stand/walk for
5 a total of less than two hours in an eight-hour day; can sit for less than two hours in
6 an eight-hour day; needs to alternate positions from sitting every 15 minutes; needs
7 to alternate positions from standing every 45 minutes; must be able to walk around
8 every 15 minutes for 15 minutes; can use his right upper extremity for handling
9 frequently, never for reaching, and frequently for fingering; can never use his left
10 upper extremity for handling, reaching or fingering; and he can occasionally stoop,
11 twist, crouch, and climb. Tr. 808-09. He further opined Plaintiff would be off-task
12 16 to 25 percent of the time during a workday, he would need to lie down once
13 daily, and he would miss four or more days of work per month. Tr. 809. The ALJ
14 gave Mr. Wright's opinion little weight. Tr. 28. As Mr. Wright is not an

15 _____
16 March 27, 2017. The Court applies the regulation in effect at the time the claim
17 was filed.

18 ⁴ Plaintiff cites to case law applicable to acceptable medical sources, EFC No. 25 at
19 9-10, however Mr. Wright is not an acceptable medical source, 20 C.F.R. §§
20 404.1513(d), 416.913(d) (2013).

1 acceptable medical source, the ALJ was required to give germane reasons to reject
2 the opinion. *See Ghanim*, 763 F.3d at 1161.

3 First, the ALJ found Mr. Wright's opinion was internally inconsistent. *Id.*
4 Relevant factors to evaluating any medical opinion include the amount of relevant
5 evidence that supports the opinion, the quality of the explanation provided in the
6 opinion, and the consistency of the medical opinion with the record as a whole.
7 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007); *Orn v. Astrue*, 495
8 F.3d 625, 631 (9th Cir. 2007). Moreover, a physician's opinion may be rejected if
9 it is unsupported by the physician's treatment notes. *See Connett v. Barnhart*, 340
10 F.3d 871, 875 (9th Cir. 2003). The ALJ found Mr. Wright's opinion is internally
11 inconsistent and inconsistent with Plaintiff's own testimony, and found Mr. Wright
12 did not provide support for the left upper extremity limitations. Tr. 28. While Mr.
13 Wright's opinion indicates Plaintiff has greater limitations in his left upper
14 extremity than his right, Plaintiff reported the opinion was wrong, as his primary
15 source of pain is his right arm. Tr. 28, 65. The medical records demonstrate
16 Plaintiff sought treatment, including surgery, on his right shoulder, rather than his
17 left shoulder. Tr. 27-28. Mr. Wright did not provide any explanation for his
18 opinion that Plaintiff has greater limitations in his left arm than his right arm.
19 While Plaintiff argues Mr. Wright inadvertently wrote right arm when he intended

1 to write left, and thus there is no inconsistency in the opinion, there is no reasoning
2 from Mr. Wright. This was a germane reason to reject Mr. Wright's opinion.

3 Second, the ALJ found Mr. Wright's opinion failed to cite to objective
4 medical evidence to support the limitations. Tr. 28. Relevant factors to evaluating
5 any medical opinion include the amount of relevant evidence that supports the
6 opinion, the quality of the explanation provided in the opinion, and the consistency
7 of the medical opinion with the record as a whole. *Lingenfelter*, 504 F.3d at 1042;
8 *Orn*, 495 F.3d at 631. Therefore, a medical opinion may be rejected by the ALJ if
9 it is inadequately supported by medical findings. *Bray*, 554 F.3d at 1228. The
10 ALJ noted Mr. Wright opined Plaintiff had limitations in his left upper extremity,
11 but did not provide any evidence to support the opinion. Tr. 28. Mr. Wright also
12 listed findings including neck and back pain, rather than objective evidence to
13 support his opinion. *Id.* Plaintiff argues Mr. Wright's treatment records provide
14 objective evidence to support his opinion. ECF No. 25 at 11-12. While Plaintiff
15 cites to multiple abnormalities found on examinations, neither Mr. Wright's
16 records nor the other medical records are consistent with the significant limitations
17 contained in Mr. Wright's opinion. Plaintiff points to a February 2016
18 appointment where Plaintiff had abnormal sensation and pain in his lumbar spine,
19 Tr. 534-35, but in April 2016, Plaintiff had a normal physical examination, Tr.
20 442-43. Plaintiff argues the imaging supports Mr. Wright's opinion, but the

1 cervical and lumbar imaging showed generally mild findings, with only the lumbar
2 MRI indicating some moderate results. Tr. 430-32, 546, 548-49. In May 2016,
3 Plaintiff was in no acute distress, had no neurologic complaints, and while he was
4 anxious and hyperactive, he had normal insight, judgment, orientation, speech,
5 cognition, and memory, Tr. 530-32, and Plaintiff has reported improvement in his
6 irritability, depression, and anxiety with medication, Tr. 25 (citing Tr. 954). In
7 June 2016, while Plaintiff had an abnormal lumbar MRI, he had a nontender spine,
8 normal range of motion, normal strength, normal reflexes, normal gait, and normal
9 sensation. Tr. 454-55. While Plaintiff points to a positive straight leg test,
10 Plaintiff had negative straight leg tests on other occasions. *See, e.g.*, Tr. 500, 505.
11 The ALJ noted multiple occasions during which Plaintiff had normal strength, and
12 normal gait and station, Tr. 23-25. This was a germane reason to reject the
13 opinion.

14 Third, the ALJ found Mr. Wright rendered his opinion prior to Plaintiff's
15 surgery and resulting improvement. Tr. 28. A medical opinion may be rejected if
16 it is unsupported by medical findings. *Bray*, 554 F.3d at 1228; *Batson v. Comm'r*
17 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004); *Thomas v. Barnhart*, 278
18 F.3d 947, 957 (9th Cir. 2002); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir.
19 2001); *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992). Further, evidence
20 of improvement with treatment is a relevant consideration. *See Warre v. Comm'r*

1 of *Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006); *Tommasetti v. Astrue*,
2 533 F.3d 1035, 1040 (9th Cir. 2008). Mr. Wright rendered his opinion in October
3 2017, but Plaintiff underwent a January 2018 right shoulder surgery, and Plaintiff
4 was doing well in April 2018, no longer taking pain medication, had progressed
5 with strengthening and range of motion, and denied numbness or tingling. Tr. 25,
6 28 (citing Tr. 942). Plaintiff was released to progress to his usual activities, and no
7 restrictions were placed on his range of motion or strength. Tr. 942. Plaintiff
8 reported some continued shoulder pain in July 2018, and he had some limitations
9 in his range of motion, but he had normal strength, and negative neer impingement
10 sign, empty can, cross arm adduction pain, and O'Brien's tests. Tr. 25, 945. This
11 was a germane reason to reject the opinion.

12 Lastly, the ALJ found Mr. Wright's opinion was inconsistent with the
13 opinion of Plaintiff's treating surgeon, Dr. Shah. Tr. 28. An ALJ may choose to
14 give more weight to an opinion that is more consistent with the evidence in the
15 record. 20 C.F.R. §§ 404.1527(c)(4), 416.927(c)(4) ("[T]he more consistent a
16 medical opinion is with the record as a whole, the more weight we will give to that
17 medical opinion."); *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996).
18 Relevant factors when evaluating a medical opinion include the amount of relevant
19 evidence that supports the opinion, the quality of the explanation provided in the
20 opinion, and the consistency of the medical opinion with the record as a whole.

1 *Lingenfelter*, 504 F.3d at 1042; *Orn*, 495 F.3d at 631; 20 C.F.R. §§ 404.1527(c)(4),
2 416.927(c)(6) (assessing the extent to which a medical source is “familiar with the
3 other information in [the claimant’s] case record”).

4 On January 19, 2017, Dr. Shah opined, “from a back standpoint he is doing
5 well and does not have further restrictions. I’ll prescribe him physical therapy to
6 help with building his strength as well as to help with his issues in his neck . . .”
7 Tr. 28, 719. Dr. Shah noted Plaintiff had pain, but had full strength with no focal
8 sensory deficits and he had a well-healed incision. Tr. 719. Dr. Shah referred
9 Plaintiff to physiatry for additional workup and potential nonsurgical interventions
10 for his symptoms, but found there was no further follow-up needed for the surgical
11 intervention. *Id.* Plaintiff argues his back impairment worsened after Dr. Shah
12 rendered his opinion and thus the ALJ erred in rejecting Mr. Wright’s opinion as
13 inconsistent with Dr. Shah’s opinion. ECF No. 25 at 12, ECF No. 28 at 6. While
14 Plaintiff points to some abnormalities in the medical records, there are also many
15 normal findings from the time Dr. Shah rendered his opinion onward; Plaintiff had
16 full or nearly full motor strength in his upper extremities, intact sensation in the
17 cervical spine, and reduced range of motion but no focal tenderness in the cervical
18 spine. Tr. 24 (citing Tr. 772); Tr. 1035. At multiple examinations, Plaintiff had
19 generally normal motor strength in his lower extremities, negative straight leg
20 raises, and a normal gait, and he reported walking his dog several times per day for

1 10 to 15 minutes each time, although Plaintiff intermittently had pain/tenderness,
2 decreased sensation, and use of a cane. Tr. 23-24, 953, 972, 1005, 1102, 1131. In
3 2017 and 2018, Plaintiff reported improvement in his symptoms with injections.
4 Tr. 1040. In November 2018, Plaintiff reported ongoing pain in his lower right
5 extremity, but also reported medications were working well for him and allow him
6 to do his activities of daily living with no adverse effects. Tr. 1034. This was
7 another germane reason to reject the opinion. The ALJ did not err in assessing the
8 medical evidence.

9 **B. Plaintiff's Symptom Claims**

10 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
11 convincing in discrediting his symptom claims. ECF No. 25 at 13-17. An ALJ
12 engages in a two-step analysis to determine whether to discount a claimant's
13 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2.
14 "First, the ALJ must determine whether there is objective medical evidence of an
15 underlying impairment which could reasonably be expected to produce the pain or
16 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).
17 "The claimant is not required to show that [the claimant's] impairment could
18 reasonably be expected to cause the severity of the symptom [the claimant] has
19
20

1 alleged; [the claimant] need only show that it could reasonably have caused some
2 degree of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

3 Second, “[i]f the claimant meets the first test and there is no evidence of
4 malingering, the ALJ can only reject the claimant’s testimony about the severity of
5 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
6 rejection.” *Ghanim*, 763 F.3d at 1163 (citations omitted). General findings are
7 insufficient; rather, the ALJ must identify what symptom claims are being
8 discounted and what evidence undermines these claims. *Id.* (quoting *Lester*, 81
9 F.3d at 834; *Thomas*, 278 F.3d at 958 (requiring the ALJ to sufficiently explain
10 why it discounted claimant’s symptom claims)). “The clear and convincing
11 [evidence] standard is the most demanding required in Social Security cases.”
12 *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r*
13 *of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

14 Factors to be considered in evaluating the intensity, persistence, and limiting
15 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
16 duration, frequency, and intensity of pain or other symptoms; 3) factors that
17 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
18 side effects of any medication an individual takes or has taken to alleviate pain or
19 other symptoms; 5) treatment, other than medication, an individual receives or has
20 received for relief of pain or other symptoms; 6) any measures other than treatment

1 an individual uses or has used to relieve pain or other symptoms; and 7) any other
2 factors concerning an individual's functional limitations and restrictions due to
3 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §§
4 404.1529(c), 416.929(c). The ALJ is instructed to "consider all of the evidence in
5 an individual's record," to "determine how symptoms limit ability to perform
6 work-related activities." SSR 16-3p, 2016 WL 1119029, at *2.

7 The ALJ found that Plaintiff's medically determinable impairments could
8 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's
9 statements concerning the intensity, persistence, and limiting effects of his
10 symptoms were not entirely consistent with the evidence. Tr. 26.

11 *1. Objective Medical Evidence*

12 The ALJ found Plaintiff's symptom claims were inconsistent with the
13 objective medical evidence. Tr. 26-27. An ALJ may not discredit a claimant's
14 symptom testimony and deny benefits solely because the degree of the symptoms
15 alleged is not supported by objective medical evidence. *Rollins v. Massanari*, 261
16 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir.
17 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch v. Barnhart*, 400
18 F.3d 676, 680 (9th Cir. 2005). However, the objective medical evidence is a
19 relevant factor, along with the medical source's information about the claimant's
20 pain or other symptoms, in determining the severity of a claimant's symptoms and

1 their disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2),
2 416.929(c)(2).

3 The ALJ found the objective evidence is inconsistent with Plaintiff's
4 physical symptom claims. Tr. 26-27. While Plaintiff alleges disabling limitations
5 due to his spinal impairments, the ALJ noted Plaintiff had normal examination
6 findings on multiple occasions, including normal range of motion, full strength,
7 normal nerve testing, normal reflexes and sensation, and a normal gait. Tr. 26
8 (citing Tr. 455, 566). While Plaintiff alleges he needs a cane for ambulation, the
9 ALJ noted a cane was never prescribed and does not appear medically necessary.
10 Tr. 26. In August 2016, both Plaintiff and his wife noted that Plaintiff did not use
11 a cane, Tr. 347, 355, although Plaintiff later began appearing at some appointments
12 with a cane. There are numerous appointments where Plaintiff ambulated
13 normally with no mention of a cane. *See, e.g.*, Tr. 507, 529, 539, 637, 700.
14 Despite some pain and tenderness in his knee and hip, Plaintiff generally had
15 normal range of motion, and no crepitus or other abnormalities on examination.
16 *Id.* (citing Tr. 700, 976). The ALJ also noted the medical records demonstrated
17 improvement in Plaintiff's upper extremity symptoms with surgery. Tr. 27 (citing
18 Tr. 942). While Plaintiff offers an alternative interpretation of the evidence, ECF
19 No. 25 at 14, ECF No. 28 at 7-8, the ALJ's finding is supported by substantial
20 evidence.

1 Regarding his mental functioning, the ALJ found the objective evidence is
2 inconsistent with Plaintiff's claims. Tr. 26-28. Plaintiff had normal orientation,
3 memory, attention, concentration, and fund of knowledge. Tr. 26 (citing Tr. 455,
4 566). Plaintiff was noted on multiple occasions as being alert, interactive,
5 pleasant, cooperative, and in no distress. Tr. 27 (citing Tr. 1141, 1184). The ALJ
6 noted the psychological consultative examination demonstrated Plaintiff had a
7 normal memory, attention, concentration, intellectual ability, executive
8 functioning, and ability to follow multistep tasks. Tr. 19-20 (citing Tr. 711-17).
9 While Plaintiff again offers an alternative interpretation of the evidence, ECF No.
10 25 at 14, ECF No. 25 at 8-9, the ALJ's finding is supported by substantial
11 evidence.

12 On this record, the ALJ reasonably concluded that the objective medical
13 evidence is not consistent with Plaintiff's complaints of disabling symptoms. This
14 finding is supported by substantial evidence and was a clear and convincing
15 reason, along with the other reason offered, to discount Plaintiff's symptom
16 complaints.

17 2. *Inconsistent Statements*

18 The ALJ found Plaintiff made inconsistent statements about his symptoms,
19 limitations, and substance use. Tr. 26-27. In evaluating a claimant's symptom
20 claims, an ALJ may consider the consistency of an individual's own statements

1 made in connection with the disability-review process with any other existing
2 statements or conduct under other circumstances. *Smolen v. Chater*, 80 F.3d 1273,
3 1284 (9th Cir. 1996) (The ALJ may consider “ordinary techniques of credibility
4 evaluation,” such as reputation for lying, prior inconsistent statements concerning
5 symptoms, and other testimony that “appears less than candid.”).

6 The ALJ found Plaintiff made multiple inconsistent statements through the
7 relevant period. Tr. 26-27. While Plaintiff testified he stopped working in 2016
8 due to his back pain in February 2016, Plaintiff reported riding his bike for two
9 hours without increased back pain in July 2016. Tr. 26 (citing Tr. 744). Plaintiff
10 also reported to a medical provider that he had stopped working due to his back
11 pain and his alcohol use making him sick at work. Tr. 534. While Plaintiff alleges
12 he had worsening symptoms after his surgery, he reported to his surgeon he was
13 doing much better after his surgery. Tr. 26. Despite allegations of disabling upper
14 extremity limitations, Plaintiff reported he could handle his own cooking, cleaning,
15 laundry, and personal care. Tr. 27 (citing Tr. 711-17). Plaintiff also made
16 inconsistent statements about his drug use, including denying any drug use on
17 multiple occasions, despite admitting continued marijuana use other times. Tr. 27
18 (citing, e.g., Tr. 460, 717). Plaintiff also reported he had been sober since April
19 2016, although records indicate Plaintiff continued to drink alcohol. Tr. 27 (citing
20 Tr. 672, 717). Plaintiff concedes there may have been inconsistencies in the

1 records, but argues any inconsistencies were minor and not a reason to reject
2 Plaintiff's claims, as the inconsistencies may be explained by Plaintiff's varying
3 symptoms and poor memory. ECF No. 25 at 14-15, ECF No. 28 at 8.

4 On this record, the ALJ reasonably concluded that Plaintiff offered
5 inconsistent statements. This finding is supported by substantial evidence and was
6 a clear and convincing reason to discount Plaintiff's symptom complaints.
7 Plaintiff is not entitled to remand on these grounds.

8 **C. Lay Opinion Evidence**

9 Plaintiff challenges the ALJ's consideration of the lay witness statement of
10 Plaintiff's wife, Nikki W. ECF No. 25 at 16-17. An ALJ must consider the
11 statement of lay witnesses in determining whether a claimant is disabled. *Stout*,
12 454 F.3d at 1053. Lay witness evidence cannot establish the existence of
13 medically determinable impairments, but lay witness evidence is "competent
14 evidence" as to "how an impairment affects [a claimant's] ability to work." *Id.*; 20
15 C.F.R. §§ 404.1513, 416.913; *see also Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th
16 Cir. 1993) ("[F]riends and family members in a position to observe a claimant's
17 symptoms and daily activities are competent to testify as to her condition."). If a

1 lay witness statement is rejected, the ALJ ““must give reasons that are germane to
2 each witness.”” *Nguyen*, 100 F.3d at 1467 (citing *Dodrill*, 12 F.3d at 919).

3 Ms. W. stated Plaintiff is generally in constant pain, though he has some
4 good days, and while he helps around the home some, he rests sometimes for hours
5 between tasks, he attends meetings/groups once or twice per day four days per
6 week, helps care for animals, he can handle his personal care with some assistance,
7 he prepares meals once every one to two weeks, he can drive but has to take breaks
8 if the drive is too long, he is able to read and watch television and is interested in
9 planting flowers, fishing, football and other outdoor activities, he has some
10 difficulties at times getting along with others, needs frequent breaks when walking,
11 and he has difficulties with lifting, squatting, bending, standing, reaching, walking,
12 sitting, kneeling, climbing stairs, seeing, completing tasks, understanding,
13 following instructions, concentrating, and memory. Tr. 341-48. The ALJ gave
14 little weight to Ms. W.’s statement. Tr. 29.

15 The ALJ found Ms. W.’s statement is similar to Plaintiff’s own symptom
16 claims, and therefore gave Ms. W.’s statement little weight for the same reasons
17 she found Plaintiff’s claims were inconsistent with the record. *Id.* Where the ALJ
18 gives clear and convincing reasons to reject a claimant’s testimony, and where a
19 lay witness’s testimony is similar to the claimant’s subjective complaints, the
20 reasons given to reject the claimant’s testimony are also germane reasons to reject

1 the lay witness testimony. *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685,
2 694 (9th Cir. 2009); *see also Molina*, 674 F.3d at 1114 (“[I]f the ALJ gives
3 germane reasons for rejecting testimony by one witness, the ALJ need only point
4 to those reasons when rejecting similar testimony by a different witness”). As the
5 Court finds the ALJ gave clear and convincing reasons to reject Plaintiff’s
6 symptom claims, the ALJ also gave germane reasons to reject the lay witness
7 testimony. Plaintiff is not entitled to remand on these grounds.

8 **D. Step-Five**

9 Plaintiff argues the ALJ erred at step five. ECF No. 25 at 17-18. At step
10 five of the sequential evaluation analysis, the burden shifts to the Commissioner to
11 establish that 1) the claimant can perform other work, and 2) such work “exists in
12 significant numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2),
13 416.960(c)(2); *Beltran*, 700 F.3d at 389. In assessing whether there is work
14 available, the ALJ must rely on complete hypotheticals posed to a vocational
15 expert. *Nguyen*, 100 F.3d at 1467. The ALJ’s hypothetical must be based on
16 medical assumptions supported by substantial evidence in the record that reflects
17 all of the claimant’s limitations. *Osenbrook v. Apfel*, 240 F.3d 1157, 1165 (9th Cir.
18 2001). The hypothetical should be “accurate, detailed, and supported by the
19 medical record.” *Tackett*, 180 F.3d at 1101.

1 The hypothetical that ultimately serves as the basis for the ALJ's
2 determination, i.e., the hypothetical that is predicated on the ALJ's final RFC
3 assessment, must account for all the limitations and restrictions of the claimant.
4 *Bray*, 554 F.3d at 1228. As discussed above, the ALJ's RFC need only include
5 those limitations found credible and supported by substantial evidence. *Bayliss*,
6 427 F.3d at 1217 ("The hypothetical that the ALJ posed to the VE contained all of
7 the limitations that the ALJ found credible and supported by substantial evidence
8 in the record."). "If an ALJ's hypothetical does not reflect all of the claimant's
9 limitations, then the expert's testimony has no evidentiary value to support a
10 finding that the claimant can perform jobs in the national economy." *Id.* However,
11 the ALJ "is free to accept or reject restrictions in a hypothetical question that are
12 not supported by substantial evidence." *Greger v. Barnhart*, 464 F.3d 968, 973
13 (9th Cir. 2006). Therefore, the ALJ is not bound to accept as true the restrictions
14 presented in a hypothetical question propounded by a claimant's counsel if they are
15 not supported by substantial evidence. *Magallanes v. Bowen*, 881 F.2d 747, 756-
16 57 (9th Cir. 1989); *Martinez v. Heckler*, 807 F.2d 771, 773 (9th Cir. 1986). A
17 claimant fails to establish that a step five determination is flawed by simply
18 restating argument that the ALJ improperly discounted certain evidence, when the
19 record demonstrates the evidence was properly rejected. *Stubbs-Danielson v.*
20 *Astrue*, 539 F.3d 1169, 1175-76 (9th Cir. 2006).

1 Plaintiff's argument is based entirely on the assumption that the ALJ erred in
2 considering the opinion evidence and Plaintiff's symptom claims. For the reasons
3 discussed throughout this decision, the ALJ's consideration of Plaintiff's symptom
4 claims and consideration of the lay and medical opinion evidence are legally
5 sufficient and supported by substantial evidence. Thus, the ALJ did not err in
6 assessing the RFC or finding Plaintiff capable of performing work existing in the
7 national economy.

8 CONCLUSION

9 Having reviewed the record and the ALJ's findings, the Court concludes the
10 ALJ's decision is supported by substantial evidence and free of harmful legal error.
11 Accordingly, **IT IS HEREBY ORDERED:**

12 1. Plaintiff's Motion for Summary Judgment, **ECF No. 25**, is **DENIED**.

13 2. Defendant's Motion for Summary Judgment, **ECF No. 27**, is
14 **GRANTED**.

15 3. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.

16 The District Court Executive is directed to file this Order, provide copies to
17 counsel, and **CLOSE THE FILE**.

18 DATED February 22, 2021.

19 s/Mary K. Dimke

MARY K. DIMKE

20 UNITED STATES MAGISTRATE JUDGE